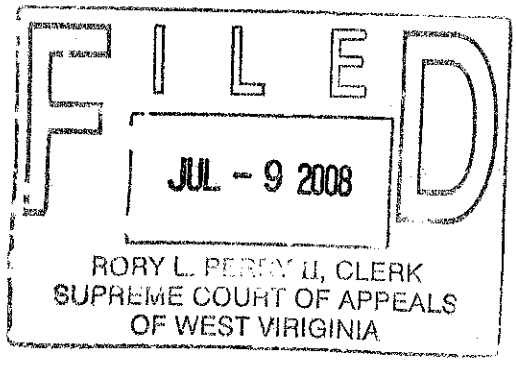
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34144



JENNIFER L. CARUSO,

Plaintiff below, Appellant,

v.

BRIAN N. PEARCE and P&T TRUCKING, INCORPORATED,

Defendants/Third-Party Plaintiffs below, Appellees,

v.

QUALITY MACHINE CO., INC., GARY K. KNOTTS and JOYCE K. HALL,

Third-Party Defendants below, Appellees.

BRIEF OF APPELLEES, QUALITY MACHINE CO., INC. AND GARY K. KNOTTS

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I. INTRODUCTION

In the noted commentary, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, it is said that Rule 41(b) "functions as a docket-clearing mechanism which enables trial courts to purge themselves of stale cases, while prodding dilatory plaintiffs to proceed to trial. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial court's calendar." FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 41(b)[5] (2nd ed. 2006) (footnotes omitted). Through her Appeal, Appellant seeks to deprive Rule 41(b) of its very meaning, and the trial courts of necessary authority.

Irrespective of her chameleon-like excuses, the fact remains that the Appellant did absolutely nothing in her civil action for more than two (2) years. [Civil Docket Sheet, attached hereto as Exhibit A]. As this Court has repeatedly instructed "[i]t is the plaintiff's obligation to move his or her case to trial, and where the plaintiff fails to do so in a reasonable manner, the case may be dismissed as a sanction for the unjustified delay. To be clear, we squarely hold that a plaintiff has a continuing duty to monitor a case from the filing until the final judgment, and where he or she fails to do so, the plaintiff acts at his or her own peril." *Callow v. Jacob*, 201 W.Va. 665, 500 S.E.2d 290, 291-2 (1997) (citing *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339, 344 (1996)). Indeed, the Appellant's only "prosecution" of her suit involved (1) the filing of the Complaint; and (2) responding to one set of written discovery. [Exhibit A]. Having conducted no discovery of her own, and having allowed the suit to languish, the trial court did not abuse her discretion in finding that Appellant's suit should be dismissed. [Order, attached hereto as Exhibit B]. Judge Berger's decision being proper, the dismissal should be affirmed.

II. STATEMENT OF FACTS

Appellant instituted the civil action below on October 21, 2004. [Exhibit A]. Discovery was served upon Appellant on November 12, 2004, and she served responses to those requests on March 14, 2005. *Id.* Thereafter, Appellant did nothing to pursue this civil action. *Id.*[1] Nothing, that is, until a Rule 41(b) notice was mailed on or about July 31, 2007. *Id.* The Notice indicated "[a] review of the docket in this matter indicates that there has been no activity or prosecution of these cases in the past year. **Rule 41(b)** of the **West Virginia Rules of Civil Procedure** provides that a Court may order that an action in which there has been no order or proceeding in the last year be struck from its docket for the plaintiff's failure to prosecute the same." [Notice, attached hereto as Exhibit C (emphasis added)].

Upon receipt of the Notice, Appellant filed a "Motion Requesting Stay of Dismissal" identifying three (3) excuses for her failure to prosecute her suit:

1. The Defendant in this action, with the consent of the Plaintiff, brought additional Defendants into this suit, and extensive discovery was conducted.*

2. The Plaintiff has contacted the Court on several occasions to inquire about the status of the case, inasmuch as a scheduling order had not been entered in this matter.

3. Plaintiff has not failed to prosecute this case, but has experienced delays in prosecuting this case inasmuch as she has moved to another state.

[1]All activity in the underlying action which occurred from March of 2005, through July 13, 2006, was conducted by the Appellees. [Exhibit A].

*As set forth above, the "extensive discovery" had been conducted by the Appellees.

[Motion at 1].[2] Subsequently, Appellant amended her alleged justifications for her dilatory conduct stating, in part:

> 1. The Defendant in this action, with the consent of the Plaintiff, brought additional Defendants into this suit, in October, 2005.
>
> 2. Since the joining of the third parties, extensive discovery was conducted, the most recent being discovery requests filed by third-party defendant Joyce K. Hall on June 9, 2006, and responses thereto being filed July 11 and 12, 2006.*
>
> 3. Plaintiff's counsel has contacted the Court on several occasions to inquire about the status of the case[3], inasmuch as a scheduling order had not been entered in this matter.
>
> 4. Plaintiff's counsel was not aware that this Court required Plaintiff to request a scheduling conference, and Plaintiff believed the lack of entry of a scheduling order to be the result of a busy circuit.
>
> 5. Plaintiff's counsel's experience in all other counties in which she practices has been that the Court issues an administrative order or letter setting a scheduling conference with the Court or the Court's law clerk, pursuant to Rule 16 of the West Virginia Rules of Civil Procedure.
>
> 6. Plaintiff should not be penalized for the mistake of counsel in requesting a scheduling conference with the Court.

[Amended Motion Requesting Stay of Dismissal at 1-2]. The Court properly determined, however, that "counsel failed to establish good cause as to why the case had not been prosecuted by the Plaintiff during its pendency and, specifically, failed to establish good cause why the case

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[2]Appellant also began a flurry of activity, including issuing Notices of Deposition. [Exhibit A]. Appellant's sudden excitement about her civil action leads one to believe that she could have been prosecuting her suit for the more than two (2) year period wherein she caused no order or proceeding to transpire.

*Again, said discovery was conducted by the Appellees.

[3]It appears that Appellant's counsel actually contacted the Circuit Clerk, as opposed to the trial court. *See* Exhibit B at 2 ("counsel had contacted the Circuit Clerk's office to inquire as to whether a scheduling order had been entered by the Court (as it was her experience in other circuits that courts entered scheduling orders sua sponte)").

had not been prosecuted during the one year immediately preceding the filing of the Notice of Dismissal. In other words, the Court finds that the Plaintiff has failed to move the case in a reasonable manner." [Exhibit B at 2]. The trial court's decision was undoubtedly correct as it appears even Appellant questioned her allegations of "good cause." *See* Plaintiff's Response to Defendant's Motion to Stay Depositions and Further Discovery at 2 ("Plaintiff's counsel . . . did cause to be filed the above-referenced Motion and Amended Motion, which ***hopefully*** provided good cause why the case should not be dismissed.") (emphasis added). Thus, the trial court properly dismissed the suit. [Exhibit B at 3]. Although unnecessary given the lack of "good cause," the trial court also considered the substantial prejudice the Appellees would incur if Appellant was allowed to move forward with her case after such considerable delay. *See* October 4, 2007, Transcript at 18, attached hereto as Exhibit D (Given five year old occurrence, "the plaintiffs are going to benefit by letting the case lay dormant and gain prejudgment interest at the rate of ten percent per year when the interest rates out in the general population have been way below that"); *Id.* at 22 ("there are four different vehicles involved, there are four independent eye witnesses, and obviously the passage of time does have an effect on cases of that nature").

Caruso now appeals the trial court's decision, asserting the following to be "good cause" for a failure to prosecute:

> When arguing to the Court regarding good cause for the delay, Appellant's counsel laid out a number of reasons to find good cause. First, there had been a mistake made by trial counsel, Ms. Tichenor, who believed that there was outstanding discovery between the Appellees as liability had been argued between them. Second, it was argued that the Appellant should not be punished for trial counsel's mistaken belief. Third, the good cause was that the Appellees needed to finish conducting their own discovery to resolve liability issues before they could respond to any demand which the Appellant would have sent to them. Fourth, and very importantly, trial counsel believed that the Court below should have

> entered a scheduling order pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure and counsel was waiting for that scheduling order to arrive which would indicate discovery deadlines and a trial date.

[Brief of Appellant at 12]. Thus, despite having the "duty to monitor a case from the filing until the final judgment," *Callow v. Jacob*, 201 W.Va. 665, 500 S.E.2d 290, 291-2 (1997) (citing *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339, 344 (1996)), Appellant attempts to blame the Appellees and the trial judge for her failure to so much as serve written discovery requests. Judge Berger determined that Appellant was to blame for her own failure to prosecute and that decision was not an abuse of the Judge's discretion. Accordingly, Judge Berger's decision should be affirmed.

III. DISCUSSION OF LAW

A. THE STANDARD OF REVIEW.

At issue is the dismissal of an action due to inactivity - a discretionary decision. In *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756, 762-3 (2003), this Court stated:

> When a circuit dismisses a case due to inactivity in accordance with W.Va. R. Civ.P. 41(b), a motion requesting the court to reinstate the matter, pursuant to W.Va. R. Civ. P. 41(b) and W.Va. Code § 56-8-12 (1923) (Repl. Vol. 1997), rests in the court's sound discretion. 'Traditionally, our scope of review, even where reinstatement is timely sought, is limited. It is only where there is a clear showing of an abuse of discretion that reversal is proper.' *Dimon v. Mansy*, 198 W.Va. 40, 46, 479 S.E.2d 339, 345 (1996).

See also FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 41(b)[9](b) (2nd ed. 2006) (footnotes omitted) ("the scope of appellate review of a ruling on reinstatement is limited. It is only where there is a clear showing of an abuse of discretion that reversal is proper."); W.Va. R. Civ. P. 41(b) (indicating that the court "in its discretion" may strike a case from the docket for

inactivity.). As more fully discussed herein, Judge Berger's decision was well within her discretion. Accordingly, the trial court's decision should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE DISMISSAL OF APPELLANT'S SUIT DUE TO APPELLANT'S FAILURE TO PROSECUTE.[4]

The Appellant's three (3) assignments of error can all be addressed by determining whether or not the trial court abused its discretion in dismissing the underlying civil action due to the Appellant's failure to prosecute. The answer to the issue can also be simply stated, no. In light of the standards traditionally applied by this Court for Rule 41(b) dismissals, Judge Berger did not abuse her discretion in this matter. Therefore, the trial court's decision should be affirmed.

R. Civ. P. 41(b) states, in pertinent part, "[a]ny court in which is pending an action wherein for more than one year there has been no order or proceeding . . . may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued." W.Va. R. Civ. P. 41(b). In opposing a dismissal under Rule 41(b), Appellant emphasizes a statement made by this Court in *State ex rel. Lloyd v. Zakaib*, 216 W.Va. 704, 613 S.E.2d 71, 74 (2005), wherein the Court quoted a 1980 decision for the proposition "'[i]nvoluntary dismissal for failure to prosecute should only occur where there is lack of diligence by a plaintiff and demonstrable

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4 The Appellees recognize that there is a distinction between a dismissal for "failure to prosecute" and a dismissal "due to inactivity for more than one year." *Hoover v. Moran*, ___ W.Va. ___, ___ S.E.2d ___, 2008 WL 696879, n. 4 (March 14, 2008). However, as this Court noted in *Hoover*:

> To some extent 'failure to prosecute' and 'inactivity for more than one year' overlap. The distinction between the two grounds for dismissal lies in the fact that 'failure to prosecute' is broader than 'inactivity for more than one year.' While the former may include the conduct of the latter, the latter does not embrace all of the types of conduct that may come under the former.

Id. (citations omitted). The trial court below likewise recognized the overlap and indicated that the Appellant "failed to establish good cause as to why the case had not been prosecuted by the Plaintiff during its pendency and, specifically, failed to establish good cause why the case had not been prosecuted during the one year immediately preceding the filing of the Notice." [Exhibit B at 2].

prejudice to defendant.'" [Quoting *Gray v. Johnson*, 165 W.Va. 156, 267 S.E.2d 615 (1980)]. Respectfully, the *Lloyd* decision merely abbreviated the standard that has routinely been applied by this Court.[5] Indeed, in the decision of *Anderson v. King*, 210 W.Va. 170, 556 S.E.2d 815, 817 (2001), the history of the standards governing Rule 41(b) dismissals was set forth, concluding with a recitation of the complete burden-shifting standard:

> In *Dimon v. Mansy, supra,* this Court discussed at length the provisions relating to the dismissal and reinstatement of civil actions for failure to prosecute. In that case, the Court indicated that dismissal for failure to prosecute is a harsh sanction and that because of its harshness, dismissal should be considered appropriate only in flagrant cases. Similarly, in *Gray v. Johnson*, 165 W.Va. 156, 267 S.E.2d 615 (1980), this Court stated that a dismissal for failure to prosecute should occur only where there is a lack of diligence by a plaintiff and demonstrable prejudice to a defendant. Further, whether the plaintiff was diligent must be determined on an *ad hoc* basis, after a careful examination of the factors contributing to the delay.
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> In Syllabus Point 1 of *Dimon v. Mansy*, the Court, in speaking of when reinstatement was appropriate, reiterated Syllabus Point 1 of *Brent v. Board of Trustees of Davis & Elkins College*, 173 W.Va. 36, 311 S.E.2d 153 (1983). That syllabus point provides that: 'Under *W.Va. R. Civ.P.* 41(b), in order to reinstate a cause of action which has been dismissed for failure to prosecute, the plaintiff must move for reinstatement within three terms of entry of the dismissal order and make a showing of good cause which adequately excuses his neglect in the prosecution of the case.'
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> Finally, in *Dimon v. Mansy*, *supra*, the Court indicated that ***if*** a party showed good cause for not prosecuting an action, the court should not reinstate the action if substantial prejudice would result to the other party.

[Emphasis added]. Consequently, the burden-shifting standard employed by the trial court herein was properly applied. *See* Exhibit B at 3 ("Having found that no good cause for the

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[5]Additionally, the *Lloyd* Court noted that the case had a "unique pattern of facts which impacted on this matter." *Lloyd, supra* at 71. Moreover, in that case, this Court made a distinction with cases concerning "the failure of counsel to effect service of process of the complaint on the defendant over a fifteen-month period." *Id.* at 75. The decision of *Gray v. Johnson*, where the abbreviation of the standard began, was also a suit arising out of the failure to timely serve. *See Gray, supra.* The instant matter, however, is a case of inattentiveness.

dormancy or delay exists, this Court does not address the issue of the Defendant's prejudice, if any.").6

At issue, therefore, is whether or not the trial judge abused her discretion in finding that Appellant did not establish "good cause" for her failure to prosecute this matter. *Dimon, supra* at 349 ("the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant. . . . the court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, and (2) whether the plaintiff made

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6 Although unnecessary, in light of the Appellant's failure to show "good cause" such that the burden never shifted to the Appellees, the trial court heard ample demonstration of "substantial prejudice." Admittedly, it has been recognized that "prejudice must be more than the ordinary expense and inconvenience of trial preparation, and is not presumed from the mere fact of delay"; however, delay can be "by itself . . . so extreme as to constitute prejudice." *Wherley v. Foss*, 416 N.W.2d 463 (Minn. 1987). As the *Wherley* Court noted:

> Here, several factors amount to prejudice, and the length of time involved was extraordinary enough that the delay alone would justify dismissal. First, '[a]fter so many years of unnecessary delay, the need to search for identifiable and concrete examples of prejudice diminishes' *Belton*, 393 N.W.2d at 246. Second, so long after the event at issue, witnesses are difficult to find and their memories have faded. The trial court was particularly concerned about the availability of witnesses and the reliability of their memories if located. Accounts of the accident by witnesses were not preserved by depositions or interrogatories by Wherleys.

Id. at 464-465. The five (5) year delay between the subject accident and the subject dismissal brought about similar concerns, all of which were considered by the trial court below. For example, the trial court was advised "This case occurred clear back in November of 2002. Now, we're almost five years past the happening of the event. In this particular situation the plaintiffs are going to benefit by letting the case lay dormant and gain prejudgment interest at the rate of ten percent per year when the interest rates out in the general population have been way below that on their prejudgment damages, if any, if they are successful. That in itself seems to be prejudice if in fact good cause was to be shown, which it hasn't been shown in this particular situation." [Exhibit D at 18]. The trial court was further advised "this is a somewhat, as far as car accidents go, complicated case, because there are four different vehicles involved, there are four independent eyewitnesses, and obviously the passage of time does have an effect on cases of that nature." *Id.* at 21-22. Consequently, even if the Appellant's application of the law is correct, the trial court's discretionary decision was proper as both "good cause," or the lack thereof, and "substantial prejudice" was considered.

any inquiries to his or her counsel about the status of the case during the period of dormancy."). The procedures delineated in *Dimon* are recognized as the proper procedures in LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE:

> ***[d] Shifting burdens.*** The plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action. If the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice in allowing the case to proceed. Should the defendant show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant.
>
> ***[e] Factors to be considered by trial court.*** The court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice.

FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 41(b)[7] (2nd ed. 2006) (footnotes omitted) (emphasis in original).

In the instant matter, the trial court properly determined that the Appellant's ever-changing excuses for her more than two (2) years of inactivity did not constitute "good cause." Initially, Appellant has repeatedly asserted that her counsel mistakenly believed that there were outstanding discovery requests amongst the Appellees. *See, e.g.,* Brief of Appellant at 12. Even if counsel's belief were accurate, outstanding discovery requests amongst other parties did not preclude Appellant from serving her own discovery requests. The West Virginia Rules of Civil Procedure state "methods of discovery may be used in any sequence and the fact that a party is conducting discovery; whether by deposition or otherwise, shall not operate to delay any other party's discovery." W.Va. R. Civ. P. 26(d).[7] Thus, in *Blomeyer v. Levinson*, 2006 WL 463503

[7]When describing the comparable Federal Rule of Civil Procedure, commentators have indicated that:

(E.D. Pa. Feb. 21, 2006) (unpublished), the Pennsylvania Court denied a motion challenging a dismissal for failure to comply with court orders and failure to prosecute. The Plaintiff in *Blomeyer* asserted, amongst other grounds, that his inattention was justified due to the behavior of the Defendants in the case. The Court stated:

> Plaintiff's reliance on Defendant's behavior and the timing of the production of deposition transcripts was seriously misplaced. Defendants have no obligation to provide any notice of the filing of their motion beyond service of a copy of that motion pursuant to the rules of procedure. Nor did Plaintiff have any reason to believe that Defendants, their counsel, or a stenographer spoke for this Court with regards to whether any 'serious action[]' in his case might occur at any given time. (*See* Pl.'s Br. at 3). Furthermore, it is clear from Federal Rule of Civil Procedure 26(d) that the discovery activity of one party 'does not operate to delay any other party's discovery.' Fed.R.Civ.P. 26(d). Plaintiff, regardless of his pro se status, is bound by the same procedural rules as any party, and there is nothing to indicate that, as he proposes, the preparation of deposition transcripts can effect what amounts to a stay of proceedings.
>
> Ultimately, Plaintiff is responsible for his own case, and cannot rely on others to go beyond the requirements of the Federal Rules of Civil Procedure in providing him special additional notice of activity in his case. We find that he could not reasonably have relied on the silence of Defendants, an overlap in discovery, or the statements of a stenographer in deciding how to proceed with his case. Thus, Plaintiff's claims based on this reliance do nothing to push the balance in his favor with regards to whether his delay was due to excusable neglect.[8]

Id.

> Before the 1970 amendments to the rule, some courts had developed a priority rule, which conferred priority on the party who first served notice of taking a deposition. The rule was found to be unsatisfactory, as when defendants were given priority in discovery, they had no reason to proceed diligently, and plaintiffs were meanwhile helpless to proceed with their discovery. The current version of the rule does away with the priority rule, and parties are allowed to conduct concurrent discovery.

10 JOHN KIMPFLEN ET AL., FED. PROC. L. ED. § 26:22.

[8]Under the same reasoning, Appellant's assertion that good cause for *her* inactivity exists as her *opponents* would need further discovery to respond to an as of yet non-existent demand cannot constitute "good cause." Not only does the behavior of others have no impact upon how Appellant was to prosecute her case, but in light of the dismissal for inactivity, there would never be a demand presented.

The final "reason to find good cause" set forth by the Appellant seeks to blame Judge Berger for her inactivity, stating "trial counsel believed that the Court below should have entered a scheduling order pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure and counsel was waiting for that scheduling order to arrive which would indicate discovery deadlines and a trial date." [Brief of Appellant at 12]. Appellant further states "[i]nasmuch as the [trial] Court apparently is not in the routine of conducting scheduling conferences or issuing scheduling orders, in violation of Rule 16(b) of the West Virginia Rules of Civil Procedure, it is no wonder that trial counsel was not operating under any assumption of time limitation." *Id.* at 13. Appellant appears to present the argument that the lack of a scheduling order makes her unaware of Rule of Civil Procedure 41(b) as said provision clearly outlines a "time limitation" to "operate under."

Regardless, the trial court correctly noted that Appellant did not make a "motion for entry of a scheduling order." [Exhibit B at 2]. Such a motion was employed by the Petitioner in a decision relied upon by Appellant, *State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 588 S.E.2d 210 (2003). Indeed, while entry of a scheduling order is mandatory, the rules do not establish a time-frame for entry of said order and, moreover, require its entry only "after consulting with the attorneys for the parties and any unrepresented parties. . . ." W.Va. R. Civ. P. 16(b). Simply stated, Appellant did nothing in this case for more than two (2) years. Were she concerned about the need for a scheduling order, she could have made a motion for entry of such an order. Appellant cannot lay the blame on her failure to prosecute her suit on the hardworking, dedicated judge assigned to rule on her case. Accordingly, the trial judge correctly determined that good cause was not established. As this Court has repeatedly held, "'[i]n the absence of a showing of good cause in support of a motion to set aside a nonsuit and reinstate the case the ruling of a trial

court denying such motion will not be disturbed by an appellate court.'" *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756, 768 (2003) (quoting Syl. pt. 2, *Nibert v. Carroll Trucking Co.*, 139 W.Va. 583, 82 S.E.2d 445 (1954)). In this regard, it must be recalled that:

> "[t]he "'good cause' requirement . . . 'is not a mere formality.'" ." *State ex rel. Letts by Letts v. Zakaib,* 189 W.Va. 616, 618, 433 S.E.2d 554, 556 (1993) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct. 234, 242, 13 L.Ed.2d 152[,163] (1964)). Establishing good cause 'puts the burden on the party seeking relief to show some *plainly adequate* reason therefore[,]' not merely *any reason. AT&T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia,* 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (emphasis added) [(internal quotations and citations omitted)]. Our jurisprudence has long 'held that . . . 'good cause can only appear by showing . . . some . . . circumstance beyond the control of the party, and free from neglect on his part."' *Winona Nat'l Bank v. Fridley*, 122 W.Va. 479, 481, 10 S.E.2d 907, 908 (1940) (quoting Syl. pt. 1, [in part,] *Post v. Carr*, 42 W.Va. 72, 24 S.E.2d 583 (1896)).
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> *Plummer v. Workers' Comp. Div.*, 209 W.Va. 710, 717, 551 S.E.2d 46, 53 (2001) (Davis, J., dissenting). *Accord* Syl. pt. 1, in part, *Plumley v. May*, 140 W.Va. 889, 87 S.E.2d 282 (1955) (holding that good cause can be established 'by showing some adventitious circumstance beyond [the aggrieved party's] control' and that he/she 'was free from neglect'); Syl., in part, *Winona Nat'l Bank v. Fridley*, 122 W.VA. 479, 10 S.E.2d 907 (holding that, to establish good cause, the aggrieved party 'must . . . show[] . . . fraud, accident, mistake, surprise, or other adventitious circumstance beyond his control, and that he was free from any neglect in relation thereto'). *See also* Syl. pt. 2, in part, *Plumley*, 140 W.Va. 889, 87 S.E.2d 282 ("'An adventitious circumstance which may afford good cause . . . is one which is unusual, unexpected, beyond the control of the movant, and free from his neglect.' Syllabus, [in part,] *Rollins v. North River Insurance Co.*, 107 W.Va. 602, 149 S.E. 838 (1929)].").

Covington, supra at 769 (emphasis in original). In the instant matter, all that is present *is* Appellant's neglect. Appellant could not have made a "mistake" preventing her from conducting discovery as the Rules of Civil Procedure afford her such opportunity. Appellant cannot rely upon the Appellees' need for discovery as "good cause" as the behavior of other parties has no bearing on Appellant's conduct. Appellant cannot blame the trial judge's failure to enter a scheduling order as such was not "beyond the control" of Appellant - she easily could have

moved the Court for entry of an Order. Finally, while Appellant places great emphasis on the perceived lack of prejudice of the Appellees, that demonstrates only a reliance upon the *abbreviated* standard, not the detailed standard specified by this Court and applied by the trial court herein. While this Court has noted that "[w]hen determining whether an aggrieved plaintiff has demonstrated good cause . . . the reviewing court must not only consider the plaintiff's evidence of good cause but also the defendant's submissions regarding the substantial prejudice. . . .," it further explained that "[t]he plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice. . . ." *Covington, supra* at 768-769 (quotations omitted). This is precisely the standard employed by Judge Berger. *See* Exhibit B at 3 ("Having found that no good cause for the dormancy or delay exists, this Court does not address the issue of the Defendant's prejudice, if any."). The trial court's decision being proper, the dismissal should be affirmed. *See Covington, supra* at 769 ("Only where we are left with a firm conviction that an error has been committed may we legitimately overturn a lower court's discretionary ruling.").

IV. CONCLUSION

The policy behind R. Civ. P. 41(b) has been well-established by this Court:

> The judicial authority to dismiss with prejudice a civil action for failure to prosecute cannot seriously be doubted. This power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases, and to avoid congestion in the calendar of the circuit court. . . . In the course of discharging their traditional responsibilities, circuit courts are vested with inherent and rule authority to protect their proceedings from the corrosion that emanates from procrastination, delay and inactivity. Thus, the determination of whether the plaintiff has failed to move the case in a reasonable manner is a discretionary call for the circuit court. The power to resort to the dismissal of an action is in the interest of orderly administration of justice because the general control of the judicial business is essential to the trial court if it is to function. To this extent,

> Rule 41(b) is still good law in that granting authority to trial judges to control their dockets through dismissals is consistent, not debilitative, of sound judicial administration. It is equally clear that it is the plaintiff's obligation to move his or her case to trial, and where the plaintiff fails to do so in a reasonable manner, the case may be dismissed as a sanction for the unjustified delay. To be clear, we squarely hold that a plaintiff has a continuing duty to monitor a case from the filing until the final judgment, and where he or she fails to do so, the plaintiff acts at his or her own peril.

Dimon, supra at 344. In the instant matter the trial court properly determined that the Appellant lacked good cause for failing to perform her duty. Indeed, while the trial court waited more than one (1) year after the Appellees' ceased their activities in this matter before entering a dismissal order, the Appellant had failed to cause an "order or proceeding" in the case for more than two (2) years prior to that order.[9] Appellant's only actions in the underlying suit were to file the case and respond to one (1) set of written discovery. The blame for such inattentiveness lies not with the Appellees, or the hardworking trial judge, but with Appellant. The lack of diligence, without good cause, justified dismissal and the trial court properly exercised her discretion in making that finding. The trial court's decision should, therefore, be affirmed.

WHEREFORE the Appellees, Quality Machine Co., Inc. and Gary K. Knotts, respectfully request the trial court's decision be affirmed.

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9 As this Court has noted "[t]here are four grounds for dismissal of a plaintiff's action under Rule 41(b): (1) failure of the plaintiff to prosecute, (2) failure of the plaintiff to comply with the rules or any order of court, (3) inactivity for more than one year, and (4) the plaintiff is delinquent in the payment of accrued court costs." *Hoover, supra* at n. 11 (citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of July, 2008, I served the foregoing **"Brief of Appellees, Quality Machine Co., Inc. and Gary K. Knotts"** upon all counsel of record, by depositing a true copy thereof in the United States mail, postage paid, in an envelope addressed as follows:

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EXHIBITS

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